SPECIFIC PERFORMANCE BY INJUNCTION.

A court of equity in exercising its jurisdiction over contracts does so because a court of law can give only money damages for a breach, which in many instances would be inadequate. In such cases, the promisee desires the specific thing which is promised to him, and unless he receives that, he does not derive the benefit he was entitled to expect. When money damages will not be adequate, equity ought to grant its relief if the circumstances are such that it can effectively act. Equity gives its relief then, when justice requires that the promisee should receive performance, and the contract is of such a character that this can be reasonably brought about by the court, If, however, equity cannot bring about a full performance of the contract, it cannot satisfactorily or justly intervene by compelling a part performance only. Unless the intervention brings about directly a complete performance, great injustice is likely to result. Equity should not interfere at all, unless it can by a proper method bring about the performance that is sought. If it cannot do that, it should refrain from intervening and leave the parties to the common law.

These questions have frequently arisen in the cases of so called negative contracts, and as their discussion has given rise to some confusion, it is proposed in this paper to consider some of these well-known cases. In 1812, Lord Eldon decided the case of Morris *v.* Colman,[1] and affirmed a decree granting an injunction. In that case, Colman had entered into an agreement whereby he bound himself not to write plays for any other theatre than the Haymarket, and Lord Eldon says in Clarke *v.* Price[2] that there was no affirmative agreement to write for the Haymarket. In Morris *v.* Colman therefore, an injunction restraining Colman from writing for any other theatre would result in an actual performance of the entire contract, because there was no agreement to write, and hence no breach of any affirmative contract. Upon Colman's complying with the injunction

[1] 18 Ves. 437. [2] (1819) 2 Wils. Ch. 157.

and refraining from writing for other theatres, nothing would be left undone.

In 1819, Lord Eldon dissolved an injunction which had been granted in Clarke *v.* Price. In that case the defendant Price had agreed for a certain period to compose and write the cases in the Court of Exchequer and supply them to the plaintiff who was to publish them, and the profits were to be divided. There was no express agreement not to furnish these cases to other publishers, although by so doing the affirmative contract would not be carried out. Price ceased to furnish the cases to Clarke, and was about to supply them to others. The plaintiff, Clarke, then filed his bill praying for specific performance and for an injunction restraining the defendant from furnishing the cases to others. It is apparent that a court of equity would not undertake to compel a man to write and furnish cases, and hence a specific performance could not be decreed. An injunction restraining Price from furnishing cases to others would not affect the affirmative breach and hence would not bring about a complete performance of the contract. Lord Eldon says: "But the terms of the prayer of this bill do not solve the difficulty; for if this contract is one which the court will not carry into execution, the court cannot indirectly enforce it, by restraining Mr. Price from doing some other act."

The court will not use coercion by indirection in cases where it cannot act directly, and as an injunction would not directly cause the complete performance of the contract, there was no reason why it should be granted.

It would not have altered the situation if there had been an express negative promise, as the same reason would have existed for refusing an injunction.

The result of these two well known cases is that in Morris *v.* Colman, as there was no agreement to write, the injunction which Lord Eldon granted actually brought about a full performance, while in Clarke *v.* Price the affirmative promise was broken, and the injunction dissolved by Lord Eldon did not, and could not, bring about a complete performance. In Kemble *v.* Kean[1] the bill prayed for specific performance and an injunction. Vice-

[1] (1829) 6 Sim. 333.

Chancellor Shadwell stated the case as follows: "but the contract is nothing more than this, that Mr. Kean shall, for a given remuneration, act a certain number of nights at Covent Garden Theatre, with a proviso that in the mean time he shall not act at any other theatre; and it is quite clear that this bill is filed for the purpose of having the performance of an agreement with regard to his contract to act. It appears to me, that it is utterly impossible that this court can execute such an agreement." And he adds further on: "There is no method of arriving at that which is the substance of the contract between the parties by means of any process which this court is enabled to issue; and therefore (unless there is some positive authority to the contrary) my opinion is that where the agreement is mainly and substantially of an active nature, and is so undetermined that it is impossible to have performance of it in this court, and it is only guarded by a negative provision, this court will leave the parties altogether to a court of law, and will not give partial relief by enforcing only a negative stipulation. I think for the reasons which I have stated, that what Lord Eldon has said in the case of Morris *v.* Colman bears upon this case."

In this case Shadwell clearly lays down the doctrine that where there is an affirmative promise which is broken and such promise is guarded by a negative provision, the court will not grant "partial relief by enforcing only a negative provision."

There is nothing in this case which gives the slightest reason for saying that Shadwell believed that a negative promise should never be enforced by injunction. It is only when "partial relief" only can be obtained, that he objects to granting this relief.

In 1852 the case of Lumley *v.* Wagner[1] came before Lord St. Leonards as Chancellor. The question in that case arose, as stated by the Lord Chancellor, "out of a very simple contract, the effect of which is that the defendant Johanna Wagner should sing at her Majesty's Theatre for a certain number of nights, and that she should not sing elsewhere during that period."

Wagner broke her agreement to sing for the plaintiff

[1] 1 De G. M. & G. 604.

Lumley and was about to sing elsewhere. Lord St. Leonards granted an injunction restraining her from singing elsewhere on the ground that although he could not compel her to sing, he might "thus possibly compel her to fulfill her engagement," although he said immediately in that connection, in continuing the injunction, "I disclaim doing indirectly what I cannot do directly."

In the course of his opinion, Lord St. Leonards proceeds to examine a number of cases with a view to showing that his own conclusion is not opposed to the previous authorities. The first case is Martin *v.* Nutkin,[1] the agreement there being on the one side to erect a cupola and clock, and on the other to relinquish bell ringing at stated periods. The cupola and clock were erected, but the bell ringing did not cease, and an injunction was granted. In that case, the affirmative promise was already performed, and hence an injunction restraining a breach of the negative promise could bring about a complete performance of the contract.

The next case was Barret *v.* Blagrave.[2] There a lien was granted under an express covenant that the lessee would not carry on trade as a victualler, etc. Underlessees were proceeding to carry on the business contrary to the restrictive covenant and Lord Lonborough granted an injunction. This was dissolved by Lord Eldon upon another ground. This instance is also one where the injunction would bring about a total performance. The lease had been given, and the negative covenant was all that remained.

After some general argument, Lord St. Leonards returned to a review of the authorities and after stating the cases of Morris *v.* Colman and Clarke *v.* Price, referred to Shadwell's discussion of Lord Eldon's views in Kemble *v.* Kean and Kimberly *v.* Jennings,[3] and dissented entirely from Shadwell's interpretation. In this connection, it must be remembered that Shadwell was not only engaged as counsel in both of these cases, but was peculiarly well acquainted with Lord Eldon's views. As Lord St. Leonards so utterly failed to understand Shadwell, it weakens still further the argument in Lumley *v.* Wagner and the interpretation placed upon Lord Eldon's statements.

[1] (1724) 2 P. Wms. 266. [2] (1800) 5 Ves. 555. [3] (1836) 6 Sim. 340.

The opinion then takes up Kemble *v.* Kean and disagrees with its conclusion. That case, as has already been shown, does not proceed upon the theory that the breach of a negative covenant should never be restrained by injunction, but that the relief should be refused when as there, the injunction can only cause partial performance, that is to say, will not bring about a performance of the entire contract. Lord St. Leonards comments thus: "Shadwell was of opinion that he could not grant an injunction to restrain Mr. Kean from performing elsewhere, which he was either about to do or actually doing, because the court could not enforce the performance of the affirmative covenant that he would perform at Drury Lane for Mr. Kemble." It is true that Shadwell did consider that he could not enforce the negative when the affirmative was being broken, but clearly not because he could never enforce a negative covenant, but because such enforcement would under such circumstances bring about only a partial performance, as the affirmative was being broken. Had Mr. Kean been performing the affirmative part of the promise, there is no reason to doubt that Shadwell would have granted the injunction. Lord St. Leonards then proceeds to speak of Shadwell as having "virtually admitted" in Kimberly *v.* Jennings that a negative covenant might be enforced in equity. But Shadwell never contended otherwise, and the so-called admission was nowise in conflict with his discussion in Kemble *v.* Kean. The illustration given by Shadwell, to which Lord St. Leonards then refers, is of an uncle giving his nephew a large sum of money in consideration of his covenanting not to perform within a particular district, and says that the court would execute such a covenant on the ground that a valuable consideration had been given for it. Lord St. Leonards then adds: "He admits therefore the jurisdiction of the court, if nothing but that covenant remained to be executed." Of course he does, because that qualification covers the entire point which Lord St. Leonards seems not to understand. In that case, enjoining the breach of the negative covenant would cause a total, not partial, performance.

The opinion continuing the examination of the cases,

comments upon Hooker *v.* Brodrick,[1] and contends that, although no injunction was granted in that case, on the ground that no breach of the negative covenant had taken place or was threatened, nevertheless it is an authority in favor of the contention in Lumley *v.* Wagner, because the court would have granted an injunction had there been a breach. But that case was also a case of a lease already granted containing a negative covenant and hence there the injunction would have totally performed the contract. Hence the case is clearly distinguishable from Lumley *v.* Wagner and is in accord with Shadwell's views.

The next case taken up is Smith *v.* Fromont.[2] In that case, there "was an attempt to restrain by injunction, a man from supplying horses to a coach for a part of a road, when the party who was applying for the injunction was himself incapable of performing his obligation to horse his part of the road." There was no negative covenant and Lord Eldon in refusing an injunction referred to a somewhat similar case where there was a negative covenant, and he had granted an injunction. Lord St. Leonards thinks that an authority for his contention, because Lord Eldon, in the case he referred to, restrained the breach of a negative covenant. But there again was a case where the injunction would bring about a total performance of the contract, and hence in reality was no argument in favor of Lumley *v.* Wagner. The opinion then takes up a former decision of Lord St. Leonards in the case of Gervais *v.* Edwards.[3] In his summary of that case, he seems to take the very position maintained by Shadwell, namely, that as he could not execute the whole of the contract, he was bound to execute no part of it. But he attempts to distinguish by saying that "here (i. e. Lumley *v.* Wagner) I leave nothing unperformed which the court can ever be called upon to perform." Just how that shows that the case has no bearing on his present argument is not clear. In that case, there was a part of the agreement which would not be performed and hence he refused to compel performance of the remainder, while in this case, although the affirmative was capable of performance, yet it could not be compelled

[1] (1840) 11 Sim. 47. [2] (1818) 2 Swanst. 330.
[3] (1842) 2 Dru. & War. 80.

by the court, and in fact was being broken. In both cases, the result would be the same, that an injunction would not bring about a complete performance of the contract.

The next case considered is Hills *v.* Croll,[1] where Lord Lyndhurst refused an injunction to restrain the violation of a negative agreement. In that case, the covenant on one side was to supply acid and on the other to buy acid from no other person. The injunction was refused because the plaintiff might later have refused to supply the acid. As a matter of fact, he was ready to supply the acid and hence, there was no breach of the affirmative covenant. The court might have met the situation by granting an injunction restraining the defendant only so long as the plaintiff supplied the acid. The case does not seem to affect either way the argument in Lumley *v.* Wagner. The next case discussed is Dietrichsen *v.* Cabburn.[2] In that case a maker of patent medicines contracted with a vendor of such articles, giving him a general agency with 40 per cent. discount, and agreeing to give no one else more than 25 per cent. He broke this negative agreement, and was supplying others with his wares at a greater discount than 25 per cent. The injunction was granted. Again we have a case where the injunction brought about a complete performance, because the only breach was the negative covenant.

Lord St. Leonards then takes up Rolfe *v.* Rolfe,[3] decided by Vice-Chancellor Shadwell and states the case thus: "In that case A., B. and C. were partners as tailors. A. and B. went out of the trade in consideration of receiving £1,000 each, and C. was to continue the business on his own account. A. entered into a covenant that he would not carry on the business of a tailor, which he had just sold, within certain limits, and C. entered into a covenant that he would employ A as a cutter at a certain allowance. The bill was filed simply for an injunction to prevent A from setting up as a tailor within the prescribed limits, and the Vice-Chancellor granted the injunction."

There we very clearly have a dissolution of the partnership followed by two distinct contracts, one between B and C, whereby B in consideration of £1,000 covenanted with C to leave the trade; the other between A and C whereby

[1] (1845) 2 Phil. 60. [2] (1846) 2 Phil. 52. [3] (1846) 15 Sim. 88.

A agreed in consideration of C's promise and £1,000 to keep out of the business within certain limits, and C. in addition to paying the £1,000 agreed to employ A as a cutter. It was this second contract which caused the litigation. As to the first contract B evidently performed his promise and was not concerned with the contract between A and C. The injunction was designed to restrain A from going into business again, and thus breaking his negative covenant, but there was no suggestion that C was not ready to continue employing A as a cutter, or that there was any breach on C's part. The injunction therefore would bring about a complete performance of the contract, and Shadwell merely said that when that was the case, it played no part that he could not have compelled C to perform, and why? Simply because C was performing as a matter of fact. Yet Lord St. Leonards continuing his mistaken idea that Shadwell held in Kemble *v.* Kean[1] that a negative covenant could not be enjoined, concludes that Rolfe *v.* Rolfe[2] does away with Shadwell's previous decisions and shows a change of view.

It is strange that such an able and clear headed judge as Lord St. Leonards should so misunderstand the position of Vice-Chancellor Shadwell in reference to this question. The authority and deservedly high reputation of Lord St. Leonards has given Lumley *v.* Wagner weight and caused the case to be followed in subsequent cases.

This result is to be regretted because it leads in many cases to hardship and injustice, and equity is clearly doing indirectly that which it admits it ought not to attempt directly. This is not altered by the many disclaimers of any such intention. The many objections to direct action by equity apply as well to this indirect action and the situation is even worse, because the court's decree does not protect the defendant by any conditional provision as to the plaintiff. Thus, in the case of an actor, the courts actually deprive him of his means of making a livelihood, and are utterly indifferent to the question whether the plaintiff is willing to continue the employment. Thus in Montague *v.* Flockton[3] the defendant by his breach had deprived himself of the right to demand a continuation of

[1] Supra. [2] Supra. [3] (1873) L. R. 16 Eq. 189.

the employment by the plaintiff, and was actually deprived of such employment, yet the court granted the injunction and remarked with almost cynical brutality, "he has brought this trouble on himself."

What an utterly absurd result is shown here, and how completely contrary to all equitable doctrines. The plaintiff could not be compelled to employ the defendant, and did not purpose to employ him, yet the court enjoined the defendant from making a living elsewhere, and did not even protect him by making a continuation of the injunction dependent upon employment by the plaintiff.

In cases of affirmative and negative promises, where the affirmative is being performed, but the negative is about to be broken, the court might well grant an injunction making it conditional upon the continuation of performance of the affirmative promise, with leave to apply for its dissolution upon a breach of the affirmative by either party.

In many of these cases, involving contracts for the services of actors or other professionals, the judges in their opinions seem to believe that it makes a difference whether the actor is great and famous or entirely unknown. This idea seems to be erroneous and not based upon principle.

In the case of contracts for the sale of land, equity, in proper cases, assumes jurisdiction and grants specific performance, because the remedy at law is inadequate, that is to say, money damages will not enable the vendee to go out in the market and purchase other similar land. This is true as to all lots of land, and it makes no difference whether the lot in question is valuable or unique or poor and, for all practical purposes, similar to other lots. Equity says no two lots can be identical and if the vendee desires that particular lot, he is entitled to it, no matter whether such desire seems sensible or not. The wisdom of the choice is for him to decide. Bearing this view in mind, let us consider the proposition as to actors and others referred to above. Pomeroy says: "Where a contract stipulates for special, unique or extraordinary personal services or acts, or for such services or acts to be rendered or done by a party craving special, unique and extraordinary qualifications, as for example, by an eminent actor, singer, artist

and the like, it is plain that the remedy at law of damages for its breach might be wholly inadequate, since no amount of money recovered by the plaintiff might enable him to obtain the same or the same kind of services or acts elsewhere, or by employing any other person."[1] This statement is based upon dicta in various cases, and proceeds upon the theory that because some one is a great singer or a great actor, that is sufficient ground for granting an injunction where such singer or actor is about to break a contract by singing or acting elsewhere or otherwise than is stipulated in the contract. In Carter *v.* Ferguson[2] the above extract from Pomeroy is quoted with approval, and the court proceeds to give as a reason for not granting the injunction that the defendant is not a great actor. There was no negative covenant in that case, and it does not clearly appear whether defendant was performing the affirmative portion of the contract or not.

Upon what sound theory can it make any possible difference whether the actor is great or unknown? If apart from this question, it is a proper case for an injunction, why should the court not grant it as well in the case of an unknown " supe " as of a great star? The real ground for an injunction is that no two men are precisely alike, and you can no more duplicate a man than you can a lot of land. There would be as much sense in refusing to perform a contract specifically because the lot of land in question is not of much value as there is to deny an injunction because an actor is unknown. If it is sound to require that the actor be a star, then specific performance in the cases of land should turn upon the question whether the land is unique in value or historic interest or the like. But courts have never dreamt of basing their decisions upon any such ground, and it is just as contrary to sound principle to give any weight to such considerations in the case of actors, singers and the like. If a manager is entitled to an injunction on all other grounds, there is no reason why he should not have it even in the case of a " supe." What if he can easily obtain other and better men, it is his wish to have that particular man in his sole employ; and he is as

[1] Pomeroy's Eq. Juris. Sec. 1343. [2] (1890) 58 Hun, 569.

much entitled to his wish as the man who desires some small insignificant piece of land.

These employment cases should turn upon very different principles, and the peculiar views taken by modern courts seem to be based upon the singular misconception of the views of Eldon and Shadwell, entertained by Lord St. Leonards in the case of Lumley *v.* Wagner.

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